IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2662 OF 2004

Shri Gangaram @ Shankar Malku Ghadge,
aged 50 yrs, r/o Stanley Welfare Society,
Room No.10 & 11, Bail Bazar,
Wadia Estate,Kurla (W),
Mumbai - 400 070
(At present in Nasik Road,
Central Prison,Nasik). .. **Petitioner**.

Vs

1. Shri A.N.Roy,
Commissioner of Police,
Gr.Bombay;
2. The State of Maharashtra,
3. The Superintendent,
Nasik Road Central Prison,
Nasik. .. **Respondents**

Mr U.N.Tripathi, for the petitioner.
Mr D.S.Mhaispurkar, A.P.P., for the respondents.

CORAM : Smt.Ranjana Desai &
D.B.Bhosale, JJ.

DATE : JUNE 06, 2005.

ORAL JUDGMENT : (Per Smt.Ranjana Desai, J.)

1. In this petition filed under Article 226 of the Constitution of India, there is a challenge to the order of detention dated 17.9. 2004 issued by the Commissioner of Police, Brihan Mumbai, under section 3(2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 ("the said Act", for

short).

2. The order of detention dated 17.9.2004 along with the grounds of detention and material in support thereof, was served on the petitioner on 21.9.2004. The order of detention is based on C.R.No.192/04 registered at Kurla Police Station under sections 302, 34 IPC r/w 120(B) IPC, r/w 37 (i)(a) r/w 135 of Bombay Police Act and two in-camera statements of witnesses A and B. The detaining authority has recorded in the order of detention that having gone through the material placed before him he was satisfied that the petitioner is a dangerous person as defined in section 2(b-1) of the said Act; that his activities have unleashed a wave of terror; that he was likely to indulge in activities prejudicial to the maintenance of public order and, therefore, it was necessary to detain him.

3. We have heard at considerable length Mr Tripathi, learned counsel appearing for the petitioner. Mr Tripathi assailed the impugned order on three grounds. Firstly, Mr Tripathi submitted that when the detention order was served on the petitioner on 21.9.2004, the petitioner was in custody. There was no imminent possibility of the petitioner being

released on bail. The bail application preferred by the petitioner was rejected. The petitioner was involved in a serious crime. He was charged with an offence under section 302 of the IPC. Considering the role played by the petitioner in the said crime there was no possibility of his being released on bail. In such circumstances, there was no compelling necessity to issue the order of detention. The learned counsel submitted that the order of detention must be set aside on this ground. In this connection, he placed reliance on the judgments in **Dharmendra Suganchand Chelawat Vs Union of India and ors, (1990) 1 Supreme Court Cases 746 and Rivadeneyta Ricardo Agustin Vs Government of the National Capital Territory of Delhi and Ors, 1994 Supp (1) Supreme Court Cases 597.**

4. There can be no doubt that when a man is in custody the detaining authority, before issuing an order of detention against him, must ascertain whether there is any compelling necessity to detain him. In **Dharmendra Chelawat case**, the Supreme Court has made it amply clear that an order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu was already in

detention and (ii) there were compelling reasons justifying such detention despite the fact that the detenu was already in detention. The Supreme Court has further clarified that the expression "compelling reasons" in the context of making an order for detention of a person already in custody, implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. Mr Tripathi laid stress on the observations of the Supreme Court that there must be cogent material before the detaining authority. He submitted that in the facts of this case there was no cogent material before the detaining authority on the basis of which he could have been satisfied that the petitioner was likely to be released from custody in the near future.

5. In this connection, it would be necessary to refer to paragraph 7 of the grounds of detention where the detaining authority has noted his awareness about

the fact that the petitioner was in custody and expressed an apprehension that the petitioner may be granted bail. Paragraph 7 of the grounds of detention reads thus;

> "I have carefully gone through the material placed before me and I am subjectively satisfied that you are acting in a manner prejudicial to the maintenance of public order. I am aware that you have not granted bail in Kurla Police Station C.R.No.192/2004, as yet. However, you may be granted bail in the said case under the ordinary law of the land. In the event, you may avail of the said bail facility and will become a free person. In view of your tendencies and inclinations reflected in the offences committed by you as stated above, I am further satisfied that after you are released on bail and in the event of your being at large, being a criminal, you are likely to indulge in activities prejudicial to the maintenance of public order in future and that it is necessary to detain you under the Maharashtra Prevention of Dangerous activities of Slumlords, Bootleggers, Drug Offenders and

Dangerous Persons Act, 1981 (Mah. No.LV of 1981) (Amendment 1996) to prevent you from acting in such a prejudicial manner in future."

6. In his affidavit in reply, the detaining authority has stated that he was aware that at the time of issuing the order of detention the petitioner was in custody in connection with C.R.No.192/2004 and that the investigation in respect of the said case was complete and the chargesheet was filed on 27.8.2004. He has further stated that he was aware that the case was committed to the Court of Sessions on 1.9.2004 and that the petitioner had filed an application for bail before the Sessions Court on 22.6.2004 which was rejected on 14.9.2004. It is further stated that considering the prejudicial activities of the petitioner he had drawn conclusion that the petitioner may apply for bail and may be successful in getting himself released on bail and, upon becoming a free citizen, would indulge in similar prejudicial activities. It is further stated that the detaining authority was aware that the petitioner had not taken actual part in the incident and his role was that of a conspirator and, under the normal law of the land

where there is such accusation the Court some times grants bail. It is further averred that the detaining authority was aware that the chargesheet was filed, and the Court also grants bail in the event the investigation is complete and there is no likelihood of commencement of trial in near future, if the accused is in custody for a sufficient period. It is further stated that although the application for bail filed by the petitioner was rejected, there was no bar for him for applying for bail either before the High Court or before Sessions Court on the ground of change of circumstance, i.e. filing of the chargesheet. It is further stated that the detaining authority was aware that many a time the accused apply for temporary bail on the ground of illness of himself or of his family members by producing the necessary medical certificate and such an application is often considered on humanitarian grounds. The detaining authority has concluded by saying that considering the role of the petitioner, material collected against him and his propensity and potentiality to indulge in similar prejudicial activities he had issued the order of detention even though the petitioner was in custody.

7. From the averment made in the grounds of

detention which we have quoted above and from the affidavit in rely it is clear that the detaining authority was aware of the fact that the petitioner was already in custody. The detaining authority was also aware of the fact that the investigation was complete and the chargesheet was filed and the bail application filed by the petitioner was rejected by the Sessions court after filing of the chargesheet. He was, however, apprehensive that since the role of the petitioner was that of a conspirator, he may get released on bail. He was also apprehensive that the petitioner may be released on bail on humanitarian grounds and after becoming a free citizen would indulge in prejudicial activities. In our opinion, in the facts of this case where no overt act is attributed to the petitioner, the view expressed by the detaining authority which rests on his subjective satisfaction, cannot be interfered with. The detaining authority had applied his mind to the vital aspect as to whether there was any compelling necessity for issuing the order of detention though the petitioner was in custody.

8. We also do not find any substance in the submission that there was absence of any cogent material to arrive at a satisfaction that the

petitioner was likely to be released on bail. According to the detaining authority, the material placed before him in connection with C.R.No.192 of 2004, indicates that the petitioner's role was that of a conspirator and that no overt act can be attributed to him. This aspect was carefully considered by the detaining authority. This is evident from the assertion made by the detaining authority in his affidavit in reply that he was aware that the petitioner has not taken actual part in the in the incident and his role was that of a conspirator and that under the normal law of the land on such type of accusation the Courts, sometimes, grant bail. It is clear, therefore, that the said material is, in fact, the cogent material on the basis of which the detaining authority has recorded his satisfaction and his apprehension that the petitioner was likely to be released on bail.

9. So far as **Ravadeneyta Richardo Agustin's case** (supra) is concerned, in our opinion, the said judgment would not be applicable to the present case. In the present case, apart from the fact that in the grounds of detention the detaining authority has expressed his awareness about the fact that the petitioner was in custody and stated that he is likely

to be released on bail, in the affidavit in reply, the detaining authority has given reasons for his apprehension. He has adverted to the role of the petitioner. He has stated that the investigation of C.R.No.192 of 2004 is complete and, sometimes, the Courts grant bail if the investigation is complete. He has further stated that on humanitarian ground also, bail is likely to be granted. Therefore, the averment made in the grounds of detention about the likelihood of the petitioner being released on bail is not a stereotype averment and is well founded. It is based on the cogent material placed before the detaining authority. In **Rivadeneyta Ricardo Agustin's case** (supra), the reply filed by the detaining authority was not found satisfactory. **Rivadeneyta Ricardo Agustin's case** (supra) is, therefore, clearly distinguishable.

10. We feel that the test laid down by the Supreme Court in **Darmendra Suganchand Chelawat's case** (supra), so far as the existence of the compelling necessity is concerned, is clearly answered in this case. If the present order is examined in the light of the said judgment, it will have to be sustained.

11. In this connection, we may also usefully refer

to a judgment of the Division Bench of this Court in **Shahid Hussain Iqbal Shaikh Vs. Commissioner of Police, Brihan Mumbai and Ors,** delivered on 21.2.2005 in Criminal Writ Petition No.2314 of 2004. In that case, the Division Bench was considering a similar question. While dealing with the contention advanced by the advocate for the petitioner that the detaining authority must have before him cogent material to arrive at his satisfaction regarding the need for issuance of an order of detention against a person who is already in custody, this Court observed that consideration of the cogent material has to be appreciated by the Court in writ jurisdiction from the point of view of subjective satisfaction of the authority and not as if it is sitting in appeal over the decision of the detaining authority or as if it is reviewing the decision of the detaining authority. We respectfully concur with this view taken by the Division Bench. As already expressed by us, the material indicating the role played by the petitioner itself would form cogent material in this case and the subjective satisfaction of the detaining authority in this respect cannot be gone into by us.

12. We may also refer to the judgment of this Court in **Mohd Ubed Abdul Rashid Ansari Vs. M.N.Singh**

and Ors, 2002 ALL MR (Cri) 1893, on which reliance is placed by Mr Tripathi. In that case also, the Division Bench was considering the question of compelling necessity. In our opinion, the facts of the present case materially differ from the facts which were before the Division Bench. In that case, it was observed by the Division Bench that the role played by the detenu in C.R.No.49/2001 was more serious than that of the co-accused who had been granted bail. It was the detenu who assaulted Hasan Shah by striking him with a weapon at his left ear side and on his neck when he tried to intervene. Moreover, the chopper used in the commission of the offence was seized under panchnama at the instance of the detenu. In view thereof, it would be very difficult for the detenu to obtain bail. It is against the backdrop of these facts that the Division Bench observed that it was difficult for the detenu to get released on bail. A clear overt act was attributed to the detenu. Such are not the facts here. The petitioner is a conspirator. In such circumstances, the subjective satisfaction expressed by the detaining authority on the material placed before him that the petitioner might be released on bail because he has not taken actual part in the incident, cannot be interfered with. Hence, this

submission of Mr Tripathi must fail.

13. Mr. Tripathi then contended that in paragraph 4 of the grounds of detention, the detaining authority has mentioned certain preventive measures taken against the detenu, like Chapter proceeding initiated against the petitioner under section 110(e)(g) of Cr.P.C in the years 1998 and 2000 and externment order issued against the petitioner in 2001. According to Mr Tripathi, these preventive measures have influenced the mind of the detaining authority and, therefore, documents in connection with the preventive measures ought to have been supplied to the petitioner. Mr Tripathi drew our attention to paragraph 7 of the grounds of detention. He laid stress on the following sentence. "In view of your tendencies and inclinations reflected int he offences committed by you as stated above, I am further satisfied that after you are released on bail and in the event of your being at large, being a criminal, you are likely to indulge in activities prejudicial to the maintenance of public order in future and that it is necessary to detain you under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (Mah No.LV of 1981) (Amendment 1996) to prevent you from acting

in such a prejudicial manner in future." Mr Tripathi contended that it is clear that further satisfaction of the detaining authority rests on paragraph 4 and, therefore, it was incumbent upon the detaining authority to supply to the petitioner documents in connection with the preventive measures. In this connection, Mr Tripathi relied on a Judgment of the Division Bench of this Court in **Smt Kamlabai Kalicharan Yadav Vs. State of Maharashtra and anr, 2001 Cri.L.J.452**.

14. We are unable to appreciate this submission of Mr Tripathi. It is important to note that in the first paragraph of the grounds of detention, the detaining authority has categorically stated as under :-

> "In pursuance of Section 8 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons act,1981 (Mah.No.LV of 1981) (Amendment 1996) r/w Article 22 (5) of the Constitution of India, I hereby communicate to you the grounds as mentioned in paragraph no.5 below on which a detention order has been made by me on this day against you under

sub-section (2) of Section 3 of the said Act. ... "

It is, therefore, clear that paragraph 5 constitutes the grounds of detention. The preventive action on which reliance is placed by Mr Tripathi, is mentioned in paragraph 4. We may also refer to the reply of the detaining authority. It is stated in the reply that the reference to the Chapter proceeding initiated against the detenu in the years 1998 and 2000 as well as the externment proceeding initiated in the year 2001 was merely by way of preamble to the prejudicial activities of the petitioner. It is further stated that it is specifically mentioned in the opening paragraph of the grounds of detention that the order of detention was based on the instances mentioned in paragraph 5 of the grounds of detention. The detaining authority has denied that the reference to the earlier preventive actions has influenced his mind to take a decision to clamp the detention order on the petitioner.

15. In our opinion, paragraph 4 is merely a preamble. In **Dhananjoy Das Vs. District Magistrate and ors, AIR 1982 Supreme Court 1315**, the Supreme Court has held that there can be a preamble in the

grounds of detention. It is pertinent to note that the detaining authority, while expressing his satisfaction, has stated that in view of his tendencies and inclinations reflected in the offences committed by the petitioner, he was satisfied that after the petitioner was released on bail and in the event of his being at large, being a criminal, he was likely to indulge in activities prejudicial to the maintenance of public order in future. The use of the word "offences" is significant. The preventive actions mentioned in paragraph 4 can never be described as offences. Obviously, therefore, the detaining authority is referring to C.R.No.192 of 2004 and two in-camera statements which disclose the offences committed by the petitioner. It would, therefore, be not possible for us to hold that the satisfaction expressed by the detaining authority in paragraph 7 rests on paragraph 4 of the grounds of detention. This has amply been made clear by the detaining authority also in his affidavit in reply, a gist of which we have quoted herein above.

16. In our opinion, reliance placed by Mr Tripathi on **Smt Kamlabai Yadav's case** (supra) is also misplaced. Relying on these judgments, Mr Tripathi urged that if the material pertaining to the previous

history and past cases against the petitioner is referred to in the grounds of detention, copies thereof must be furnished to the petitioner because the said material has influenced the detaining authority while issuing the detention order. In this connection our attention is drawn by Mr Mhaispurkar, learned APP, to a judgment of the Division bench of this Court in **Sanjay Kalpanath Pandey Vs. Shri M.N.Singh and ors, 2001 All MR (Cri) 2241**. In that case also, a similar contention was advanced before the Division Bench. Reliance was placed on **Smt Kamlabai Yadav's case** (supra). This Court distinguished the said judgment and observed that in **Smt Kamlabai Yadav's case** in paragraph 1 of the grounds of detention, there is a reference to the fact that since 1997 the petitioner had been continuously engaging in commission of violent and desperate acts and had created a reign of terror and his activities were prejudicial to the maintenance of public order, and in paragraph 2 there is a reference to five such cases pertaining to his criminal history but, it was stated in that said paragraph that the said offences were not considered while passing the detention order and in paragraph 4 of the grounds of detention, the detenu was first dubbed as a dangerous person and only thereafter there was a reference to the two offences

and two in-camera statements on which the detention order was founded. The Division Bench observed that it was in such a factual matrix that this Court observed in **Smt Kamlabai Yadav's case** that on the basis of the past history of the detenu, he was first dubbed as dangerous person and then only the recent criminal activity has been referred to in the detention order.

17. Such are not the facts here. In this case, paragraph 4 contains the past history. Thereafter, from paragraph 5 onwards, the grounds of detention have been narrated. A gist of the statements of witnesses A and B has been noted and in paragraph 5 the detaining authority has expressed his satisfaction that the petitioner is a dangerous person. Therefore, it cannot be said that it is the past history which persuaded the detaining authority to come to a conclusion that the petitioner is a dangerous person. Facts of the present case are similar to the facts in **Sanjay Kalpanath Pandey's case** (supra). We can, therefore, adopt the distinction drawn by the Division Bench in **Sanjay Kalpanath Pandey's case** and hold that **Smt Kamlabai Yadav's case** is not applicable to the facts of the present case. In our opinion, paragraph 4 is clearly a preamble. The subjective satisfaction

mentioned in paragraph 7 cannot be linked with paragraph 4 and, therefore, the order of detention cannot be set aside on the ground that the material in connection with the preventive actions was not supplied to the petitioner. This submission of Mr Tripathi must also fail.

18. Lastly, Mr Tripathi pointed out that in the grounds of detention, it is mentioned that the blood stained weapons, clothes of the deceased and weapons of assault were recovered and seized under the panchnama and were sent to the office of the Chemical Analyser and the report was awaited. Mr Tripathi contended that the detaining authority ought to have waited till the Chemical Analyser's report was received. The order of detention which is passed in a hurry without perusing the report, is illegal and must be set aside. In this connection, Mr Tripathi relied upon a judgment of the Supreme Court in **Madhu Garg Vs. Union of India and Anr, 2004 Cri.L.J.4639**.

19. In the affidavit in reply, the detaining authority has stated that he was aware that the sponsoring authority had forwarded Muddemal for report of the chemical analysis. However, the report was not received till the issuance of the detaining order and

hence it was not forwarded to him by the sponsoring authority. It is further stated that the material placed before the detaining authority was sufficient to come to a conclusion about the involvement of the detenu and his associates in the said offence and therefore there was no need for him to wait for the Chemical Analyser's report which otherwise has only a corroborative value. We find that the explanation offered by the detaining authority in his affidavit is satisfactory. The Chemical Analyser's report would, indeed, have a corroborative value. The detaining authority, on perusal of the material placed before him, has come to a conclusion that there was sufficient material placed before him to indicate involvement of the petitioner. It would not be possible for us in the facts of this case to find fault with this subjective satisfaction. It is not possible for us to hold that the detaining authority ought to have waited for the Chemical Analyser's report and then issued the order of detention. Reliance placed by Mr Tripathi on **Madhu Garg case** (supra) is wholly misplaced. Firstly, in that case, the Supreme Court was dealing with the order of detention dated 20.10.2003 issued under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. The export consignment was

misdeclared by the detenu stating it to be alloy steel forging (machined), although it was metal scrap. The seized goods were sent for chemical analysis. The test report dated 23.10.2003 indicated that samples were made up of alloy steel but it was not clear as to whether the goods were alloy steel forging (machined) as declared by the detenu. On the facts before the Supreme Court, therefore the Supreme Court found that the subject matter of the consignment was not scrap metal. It is against the background of these facts that the Supreme Court observed that the order of detention passed by the detaining authority without waiting for the result of chemical analysis was improper. In that case, the order of detention in fact rested on the goods that were seized. The case was that they were misdeclared to be alloy steel forging (machined) though it was metal scrap. But the test report indicated that it was not metal scrap. Obviously, therefore, the chemical analyser's report was found to be material. In this case, according to the detaining authority, there was sufficient other material before him to come to the conclusion about the petitioner's involvement in the said offence. The judgment in **Madhu Garg case** (supra) is, therefore not applicable to the facts of the present case. We are unable to come to the conclusion that the order of

detention is illegal because the detaining authority did not wait for the Chemical Analyser's report. This submission of Mr Tripathi must also fail. No other submissions were advanced by Mr Tripathi. In our opinion, the order of detention is perfectly valid and deserves to be confirmed. The writ petition is, therefore, dismissed. Rule is discharged.

(D.B.Bhosale, J.) **(Smt Ranjana Desai, J.)**

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